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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, WARDEN,

PETITIONER,

-vs-

MAXWELL D. WHITE, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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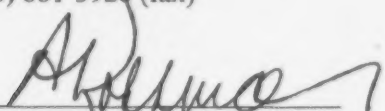

COUNSEL FOR PETITIONER

PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

There is no reason for this Court to review this juror's voir dire answers. Juror Sheppard repeatedly and candidly acknowledged her biases and inability to be impartial toward Respondent White. There is nothing to support the alarmist and inaccurately grandiose contention that the Sixth Circuit's decision "rewrites AEDPA standards." (Pet. 2). The petition admits the Circuit Court properly "recited AEDPA's requirements" (Pet. 2), suggesting this case is simply about the Petitioner Warden not being happy with the Circuit Court providing sentencing phase relief for one the Petitioner is quick to label a "cop-killer." (Pet. 2)

A. The Petition Misrepresents the Factual Basis of the Juror's Comments Relating to Her Bias and Inability to Be Impartial.

In the Petitioner Warden's Statement of the Case only a few quotes from Juror Sheppard's voir dire are noted. These few quotes do not convey the full tenor of Juror Sheppard's comments openly admitting her bias and inability to be impartial. The Petitioner has excluded from the Appendix any and all of Juror Sheppard's general voir dire comments that preceded the death-qualifying. This omission fosters a misleading representation of Juror Sheppard's bias and impartiality. It is of no significance that prior to death qualifying defense counsel had withdrawn an initial challenge for cause during the general voir dire Apx. A-43. Defense counsel and Juror Sheppard both made specific reference to Sheppard's candid earlier responses in the course of her 'death qualifying' voir dire answers.

For example, having had time to reflect upon matters subsequent to her general voir dire, Juror Sheppard was asked whether she could set aside her personal sentiments and follow the law relating to the sentencing phase. Sheppard's answer reiterated and referenced her earlier comments: "I feel with what I have gone through today with the strong feelings I had when I went into the

courtroom in the beginning and being questioned could I be truly, truly fair about this, *I feel I still have those strong feelings*, and *to be honest, I don't think I would be fair to the Defendant*." (Apx. A-47) (emphasis added). This backsliding renders it appropriate to review those "strong feelings" when considering the juror's bias and ability to remain impartial during the death qualification.

And when defense counsel addressed the sentencing phase in voir dire, he too directed Sheppard's attention to what she had "indicated early on" in the general voir dire testimony where "you felt that you could not be fair." Counsel asked her whether, "[a]s you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?" Sheppard admitted, "I think to a certain degree, yes. . . . I could not." Apx. A-53. Counsel asked her specifically whether she had an opinion as to what the penalty should be in this particular case, to which Sheppard replied, " *[l]ike I indicated earlier*, if the facts prove that he is guilty, yes, I have a strong belief." Apx. A-53.

By omitting these general voir dire comments from both the analysis and the Appendix, the petition misrepresents the extent of Sheppard's bias and inability to be impartial. These omitted comments bear significance in that the petition's Introduction characterizes Sheppard's responses as having merely "voiced some hesitations" about her ability to be fair. (Pet. 3). That minimizes those comments to the point of being a mischaracterization.

It is the *totality* of Juror Sheppard's voir dire that is relevant to a proper determination of these issues. *Patton v. Yount*, 467 U.S.1025, 1036 (1984); *Wainwright v. Witt*, 469 U.S. 412, 430 (1985)). Therefore, Respondent White provides these additional facts of record that properly constitute the Statement of the Case.

B. Supplemental Voir Dire Comments of Juror Sheppard That Are Excluded from the Petition and the Appendix.

From the very first, Sheppard candidly admitted that she had formed an opinion about Respondent White's guilt based upon the "evidence" presented in the newspapers and on television. Apx. A-13.

As trial counsel sought to educate Sheppard about the dangers of relying upon media reports as evidence, Sheppard indicated that "[t]o be honest," she said, "when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there."Apx. A-13.

Trial counsel explained the difference between evidence and news media reports, to which Sheppard commented. "To a certain degree I agree on that [evidence vs. media], but with all the police officers and that that were involved in this, I really feel that he did do it. Apx. A-13 - A-14.

Trial counsel again explained that the trial would deal with more complex issues than simply whether Mr. White killed Trooper Gross. Sheppard indicated that, "I still feel -- I mean I will be willing to listen to everything, *but I still feel too strong about this*." Apx. A-14 - A-15.

Trial counsel asked Sheppard if the defense would have to present enough evidence to change her mind as opposed to the State having to come forth with sufficient evidence to prove its case, and queried whether "anything I say is not going to change your mind?" Sheppard stated, "I'm afraid not." Apx. A-15.

Trial counsel challenged her for cause but she was not removed. Apx. A-15.

In response to the state's effort to rehabilitate, Sheppard indicated that she felt the evidence to be introduced at trial would be exactly the same as the "evidence that I believe now." Apx. A-30. The Prosecutor did *not* ask whether Sheppard could be fair and impartial. Rather she asked Sheppard that if she "heard something differently [in the courtroom] and heard that something that she expected to be there isn't" could she decide the case on the evidence presented in the courtroom,

to which Sheppard replied that she could. Apx. A-30.

Defense counsel returned to questioning Sheppard and she again reiterated that "I still do have an opinion about this, and you will have to work hard to change that opinion." Apx. A-37. Sheppard explained that, ". . . I am a fair person. And I am willing to listen to all the evidence and then make my final decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there." Apx. A-37 - A-38.

C. Sheppard's Articulated Comments During Death Qualification Revealed Her Bias and Inability to Be Impartial.

As the case moved into the death-qualifying voir dire Sheppard indicated that she was for the death penalty. Apx. A-46. Having had time to reflect upon matters, when asked whether she could set aside her personal sentiments and follow the law, Sheppard informed that her earlier admissions of bias would yet impact her sentencing decision: "I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and *to be honest, I don't think I would be fair to the Defendant*." Apx. A-47 (emphasis added).

The Prosecutor then asked whether Sheppard would impose the death sentence only under the circumstances instructed by the Judge or whether "you'd do instead what you wanted to do?" Apx. A-47. Sheppard continued: "I feel by listening to everything, I think I could be fair, *but I can't sit here and say, yes, I will be fair.* I feel I can be after I hear all the facts, but *yet again I have doubt*. And I don't know if it's a strong enough doubt. I just want you to be aware of it." Apx. A-47 (emphasis added).

After further noting that she was in favor of the death penalty "as long as it's proven that it should be given," she again equivocated about her fairness. When trial counsel addressed the

sentencing phase, he recalled Sheppard's earlier general *voir dire* testimony where "you felt that you could not be fair," and asked her whether, "[a]s you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?" Sheppard admitted, "I think to a certain degree, yes. . . . *I could not.*" Apx. A-53.

Trial counsel asked concisely, "do you have an opinion as to what you feel the penalty should be in this particular case?" Sheppard responded: "Like I indicated earlier, if the facts prove he is guilty, *yes, I have a strong belief.*" Apx. A-53.

Trial counsel asked if this meant that she would vote for death "without any mitigation, without hearing any further evidence?" Sheppard's reply informed that even she thought that she should be removed:

> I know that completely doesn't feel fair and I know -- I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, *but I still have a little bit of doubt.* And I think for a person's life, there should not be any doubt whatsoever.

Apx. A-54.

Sheppard was then asked whether she felt that she should even be a juror:

> MR. ROBERT WHITNEY: You feel that you should *not* serve as a juror in this cause because of that?
>
> THE JUROR: What? Yes.

(Apx. A-54. Trial counsel renewed the challenge for cause. (Petitioner's App. 210a). The judge again allowed the Prosecutor to try to rehabilitate.

> [Prosecutor] FRANCESCONI-ROGERS:
>
> * * *
>
> If the Court were to give you the instructions about the procedure that you must follow during the penalty phase, could you listen to his instructions and follow them in reaching a conclusion about what the

appropriate penalty might be?

> THE JUROR: Like I have stated, I feel I could do this, but yet, again, *I still have that little bit of doubt that I couldn't.*
>
> MS. FRANCESCONI-ROGERS: But you're telling us you feel you could?
>
> THE JUROR: Mm-hmm.
>
> MS. FRANCESCONI-ROGERS: And at this point you're telling us that you're willing *to attempt* to do that.
>
> THE JUROR: Yes.

Apx. A-55. (emphasis added).

Prosecutor DeSanto summed up acknowledging Sheppard's repeated inability to overcome her bias. "And all that means is you need to obey the instructions *to the best of your ability.*" Apx. A-56 (emphasis added).

Juror Sheppard reiterated her belief that Mr. White *would* be found guilty and expressed her actual *desire* to be a part of his sentencing:

> THE JUROR: When I walked in here today, it was -- I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the truth.
>
> *And if we come to the truth that I feel we're going to*, and I hate to see one man's life taken, but in fair honesty, *in him taking another life, I think that he should be punished for that, and I'd like to be a part of that.*

Apx. A-56 - A-57 (emphasis added).

Presented in context it is clear what Sheppard's comment that she "would like to be a part of that" implied. However, in the petition this comment is referenced piecemeal and out of context and the Warden asserts that "that passage could just as easily be read to suggest something entirely different." (Pet. 23). This highlights the petition's weakness, which is that the analysis is not about

what the trial court or the Ohio Supreme Court found Sheppard to have said and meant, but rather how the Warden himself interprets what Sheppard "seems to be saying." (Pet. 23). Such arguments have no bearing on the Sixth Circuit's AEDPA analysis.

Following those comments Sheppard was asked a final bout of leading questions, not specifically directed to her ability to be fair and impartial. The Prosecutor's final, generic, leading question, was whether Sheppard would obey the law and the court's instructions, to which Sheppard simply replied, "Yes, I would." Apx. A-57.

Thereafter defense counsel asked two general leading questions eliciting one-word responses:

> MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror.
>
> THE JUROR: Right.
>
> MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?
>
> THE JUROR: Yes.

Apx. A-57 - A-58.

Finally, the petition omits the significant fact that the trial court engaged in no questioning of Sheppard, stated no reasons or rationale for denying the cause motion to disqualify, and expressed no factual findings whatsoever before it summarily denied the challenge for cause. Apx. A-58. This left the Sixth Circuit Court to divine from thin air exactly what factual predicate the trial court relied on to deny the challenge for cause motion.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Cited AEDPA Standards and Properly Acknowledged the Special deference Due to Trial Court Findings.

The Sixth Circuit's decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. In granting penalty phase relief, the Sixth Circuit properly addressed the biased juror analysis by the Ohio Supreme Court under §2254(d)(1), while acknowledging both the AEDPA's presumption of correctness standard and the "special deference" due to any trial court findings. Apx. A-5.

That strange claim that the Sixth Circuit 'rewrote' AEDPA law, (Pet. 2), is belied by the decision itself. The Sixth Circuit specifically set forth the proper AEDPA standards in Section II of the opinion. (Petitioner's App. 5a-6a). The Sixth Circuit clearly identified that "a writ may not be granted unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established' Supreme Court precedent or 'was based on an unreasonable determination of facts in light of the evidence presented' during the state court proceedings." (Petitioner's App. 5a). The Sixth Circuit specifically recognized that "the state court's factual findings are entitled to a presumption of correctness and may be disturbed only upon a petitioner's showing by clear and convincing evidence that the factual findings were incorrect." (Petitioner's App. 6a).

As will be discussed, the Sixth Circuit then applied those stated principles, identifying the proper legal standards and, on three separate occasions, specifically addressed the merits of the claim "in light of the special deference owed to a trial judge's determination of juror impartiality as well as the deferential standard for reviewing factual findings under §2254". (Petitioner's App. at 35a; Petitioner's App. 41a-42a ("Notwithstanding the deference owed to trial judges on issues of juror impartiality . . . ," and "Despite the deference usually owed to trial judges . . .")).

Even based solely upon Sheppard's death- qualifying comments, the petition acknowledges, as it must, that the Sixth Circuit clearly stated that it *was* applying the standard of legal deference properly brought to a voir dire analysis. (Pet. 10, noting that the Circuit Court concluded that

"[d]espite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony."; Pet. 20, noting that "the [Sixth Circuit] court below spoke of providing deference . . . ").

Petitioner Warden's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The decision makes clear that the Circuit Court thoroughly reviewed the voir dire of Sheppard, evaluated the totality of her comments, the questions and comments of the attorneys, the complete lack of questions and comments by the trial court, and, applying the proper AEDPA standards, determined not only that Sheppard was in fact biased and unable to be fair and impartial, but that the trial court's determination to the contrary was unreasonable given the facts.

The Petitioner Warden chooses to ignore the Circuit's §2254(d)(1) analysis, thereby allowing the relief granted by the Circuit pursuant to clearly established law to remain essentially unchallenged before this Court. Rather, the petition argues incongruously that "federal courts may not grant the writ unless the state court's factual finding is an "unreasonable determination of facts in light of the evidence presented" during the state court proceedings," citing to §2254(d)(2). (Pet. 13). To the extent the petition is arguing, incorrectly, that deference precludes relief or that a juror bias issue may only be analyzed pursuant to §2254(d)(2), the Petitioner is wrong, and it is the Petitioner that would 'rewrite' AEDPA standards.

B. Settled Precedent Dictates That Juror Bias Is a Question of Law and Therefore May Appropriately Be Resolved Pursuant to AEDPA's §2254(d)(1) Analysis.

1. The constitutional question of bias is a question of established law and therefore properly subjected to § 2254(d)(1) review.

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude

> relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). *See also Miller-El v. Dretke*, 125 S.Ct. 2317, 2325 (2005). A trial court's "broad discretion" in the conduct of voir dire, although entitled to deference, is nevertheless "subject to essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

In *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), this Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's view's would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In *Witt*, the juror was properly struck because she repeatedly "affirmed that her beliefs would interfere with her sitting as a juror." 469 U.S. at 434. The *Witt* Court noted that this standard does *not* require that a juror's bias be proved with "unmistakable clarity." *Id.*, at 424.

In *Witt*, 469 U.S. at 430, the Court noted that the mere ruling denying a motion to excuse for 'cause' is the equivalent of the trial court making the finding of fact regarding a juror's bias. But the issue then becomes whether the finding is "fairly supported" by the "record . . . considered as a whole. . ." *Id.*, at 431. This pronouncement itself undermines the petition's arguments which, as noted in Respondent White's Statement of the Case, sought to excluded from this Court's review consideration of Juror Sheppard's general voir dire comments in which she repeatedly and candidly expressed both her bias towards Respondent White and her continued inability to remain impartial even after the voir dire moved into the death qualifying phase.

The refusal by the Warden to address the Sixth Circuit's §2254(d)(1) arguments improperly eliminates from habeas review the Ohio Supreme Court's conclusions, as enunciated in its direct appeal decision, *State v. White*, 82 Ohio St.3d 6 (1988), 693 N.E.2d 772 (Ohio1998), (Petitioner's App. 177a *et seq.*). These conclusions are legal determinations that applied Supreme Court precedent (incorrectly) and *are* properly subject to the §2245(d)(1) review applied by the Sixth Circuit. *Id.*, 467 U.S. at 1037, n. 12. Contrary to the petition's assertion, (Pet. 10), it is clear from *State v. White*, that the Ohio Supreme Court made no factual findings itself.

2. When faced with an allegation of bias, the question as a matter of law becomes not only 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence' but also, and ultimately, 'should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

This clearly established law has been acknowledged by the Circuit Court. *Williams, v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004).

The Petitioner Warden's refusal to address the Circuit's (d)(1) analysis head on results in a failure to discuss *Patton's* caveat that the constitutional question to be resolved is whether "the juror's protestations of impartiality [should] be believed." *Patton*, 467 U.S. at 1036. This glaring omission has the effect of reducing Sheppard's voir dire to mere gamesmanship in which the government's ultimate goal would be to lead a juror to the point of answering 'yes' to whether she could be fair and impartial. That would be the end of the discussion under the Warden's reasoning, and as a practical matter, this is the position asserted by the Warden.

It is a critical and fatal omission for the petition to never address the Circuit's analysis of the Ohio Supreme Court's decision as an unreasonable application of clearly established law, §2254(d)(1), given that state court concluded that, "[s]ince the challenged juror *ultimately* said that

she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause." (Petitioner's App. 183a - 184a). The Sixth Circuit began it own analysis with recognition of that "special deference" which was due the trial court's credibility assessment in the first instance. Yet, this is precisely what the Petitioner Warden repeatedly claims the Sixth Circuit *failed* to do. But pursuant to §2254(d)(1), the Sixth Circuit recognized, as the Warden never does, that the ultimate question on review of the state court decision remains whether the jurors protestation of impartiality should be believed. (Petitioner's App. 32a - 33a).

There is no 'rewriting' of the AEDPA here. Circuit courts have clearly and routinely applied the same reasoning as the Sixth Circuit noting that a trial court's refusal to excuse a juror will not be upheld "simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial despite earlier statements or circumstances to the contrary." *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3rd Cir. 1995); *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3d Cir. 1987) (though a juror swears that he could set aside any opinion he might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if other facts of record indicate to the contrary), aff'd, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Rather the flaw in the Warden's entire petition is its bottom line argument that the deference due the trial court somehow precludes the granting of relief on this record.

3. The petition weakly shores up support for its argument by referencing Sheppard's ultimate one-sentence/ one-word responses to leading questions as part of her "unequivocal assertions" that she could follow the law and be fair and impartial. (Pet. 6, 11). It is noteworthy that the petition doesn't always make clear that several of Sheppard's cited answers are parsed and

unarticulated. (See *e.g.*, Pet. 21, noting that Sheppard "affirms" "that she will "obey the law and the [c]ourt's instructions" without noting that Sheppard had merely answers "Yes, I would" to the Prosecutor's leading question.) (Apx. A-57; Pet. 21, noting that Sheppard "affirms" "that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case," without noting that Sheppard had merely answered "Right" to the leading question by defense counsel.) Apx. A-57 - A-58.

The Supreme Court has not hesitated, particularly in capital cases, to find that even amidst the deference due to trial courts, certain exclusions for fairness must be made to effectuate constitutional protections. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 735 (1992). Thus, as a hedge against reducing juror bias questions to whether, as the Warden would have it, the juror ultimately can be coaxed into saying 'yes' or 'right' to a leading question about being fair and impartial, the Supreme Court in *Patton* provided guidance to lower courts in terms of how, in the context of giving the appropriate deference to the trial court, reviewing courts may *fairly* approach the factual analysis and the credibility assessments which often underlie a trial courts denial of a 'cause' challenge.

As *Patton* recognized, these guiding principles were necessary for cases just like Respondent White's, given that "[j]urors [] cannot be expected invariably to express themselves carefully or even consistently." 467 U.S. at 1039. As such, in the fair resolution of some inconsistency "[t]he trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." Similar reasoning is properly applied on review. In *Murphy v. Florida*, 421 U.S. 794, 801 (1975), the Court reasoned that "We cannot attach great significance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all."

Similarly in *Morgan*, 504 U.S. at 734-735, the Court cautioned that dogmatic inquiries and

leading questions about a juror's ability to be fair and follow the law are inadequate to remedy jurors' bias, "their protestations to the contrary notwithstanding." *Morgan* held that answers to "general questions of fairness or impartiality" cannot negate a specific statement by the prospective juror that he or she would not be impartial. *Id.*, at 745.

These guiding principles have been regularly followed by Circuit Courts. *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3rd Cir. 1987). Thus, even assuming Juror Sheppard's ultimate one-sentence or one-word responses *did* constitute such an "affirmative statement of impartiality," such perfunctory statements alone are not to be, as a matter of law, the determining factor. Rather, the trial court must still determine, from the context whether such a statement is believable. *Patton*, 467 U.S. at 1036. In Respondent White's case the trial court did no such thing.

Such clearly established guiding principles of fair assessment, have no sway in the Warden's analysis. While they would be equally applicable to a §2254(d)(2) analysis of any specific findings by Respondent White's trial court, (if it had made any), the Warden neither addresses nor even acknowledges them, even though they properly form the valid basis for the Sixth Circuit's (d)(1) reasoning.

For all the petition's focus upon deference, there is nothing in this record to indicate that the trial court made any determination or applied any reasoning to its factual 'finding' that simply overruled the challenge for 'cause' without explanation. By failing to apply the guiding principles of *Patton, Murphy* and *Morgan* the Warden's argument renders even its own application of §2254(d)(2) standardless, as *any* denial of 'cause' by a trial court based upon a juror's ultimate responses to one or two final leading questions would forever insulate the decision from federal review. Deference would itself deny relief.

Put another way, the Warden recites established law noting that "[t]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are *fairly* supported by the record," (Pet. 13), but never accepts that there are any guiding principles to assist the courts in assessing whether that record support is indeed *fair*.

Given that the trial court gave no reasons of any kind for overruling the challenge for cause, clearly established law requires that on review, the credibility of Juror Sheppard's responses in accordance with *Patton, Murphy* and *Morgan*, should be primarily weighted in favor of those answers that were 'most fully articulated,' rather than those mere responses to leading questions.

4. In granting sentencing phase relief, the Sixth Circuit's analysis followed the Supreme Court's guidelines exactly and considered Juror Sheppard's "cursory" answers to the leading questions against her more articulated answers. (*See* Petitioner's App. 40a - 41a (after detailed analysis of Sheppard's comments, and noting the specific comments that "make her claims of fairness and impartiality toward the defendant elsewhere in her voir dire suspect," stating:

> Although Sheppard stated subsequent to these comments that she could follow the law and not let her personal feelings interfere, her statements to this effect were far more cursory and, given the frequency with which her statements shifted back and forth on her ability to be fair, such subsequent statements are insufficient to alleviate the grave concern raised by her previous comments.

It is only after such a detailed analysis of the entire voir dire that the Sixth Circuit states that it is "[i]n light of these facts [that] we find that juror Sheppard was unable to "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court" (Petitioner's App. 41a)(citation to *Irvin* omitted) and concluded that "[n]otwithstanding the deference owed to trial judges on issues of juror impartiality, Sheppard's statements fell far short of the dictates laid out in Supreme Court case law regarding juror bias." (Petitioner's App. 41a - 42a).

Thus, the petition seriously misrepresents the Sixth Circuit's analysis when it decries "[i]nstead of searching for support in the record to affirm the trial court's determination, the Sixth Circuit focused on it *own* "grave" and "weighty" concerns about Sheppard's voir dire testimony." (Pet. .22). It did nothing of the kind. The Circuit Court's grave and weighty concerns were clearly the end result of having done a full and fair analysis guided by clearly established Supreme Court principles of review. The Warden doesn't like the result of the Court's analysis but the assertion that the Sixth Circuit somehow "abandoned settled understandings of "deference" in favor of some broader power to oversee juror-bias determinations," (Pet. 22), is simply not true.

5. The petition relies heavily upon *Rice v. Collins*, 126 S.Ct. 969 (2006), for the unchallenged assertion that credibility findings by a trial court, (in a *Batson* context), are entitled to clear-error-type deference. (Pet. 12-13). *Rice* noted that a federal court could grant the *habeas* petition if it was unreasonable for the trial court to credit the prosecutor's race-neutral explanations. The Petitioner Warden argues incorrectly that the situation in *Rice* is "nearly identical" to that of Respondent White, but fails to note that unlike Respondent White's trial court, which provided no explanations or reasonings whatsoever for its denial of the cause challenge, the *Rice* trial court gave a precise explanation and finding for its ruling. ("[H]owever, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The Court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016").

The *Rice* Court's ruling overturned the Ninth Circuit's analysis because the panel majority had "substituted its evaluation of the record for [the evaluation] of the state trial court." *Rice*, 126 S.Ct. at 973. Respondent White's trial court gave no evaluation of anything, a fact that the petition ignores throughout.

6. The circuit case law upon which the Petitioner Warden bases his arguments is also inapposite to the issue. The petition repeatedly cites to *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), for the proposition that federal courts defer to trial court findings where a juror's responses lend support in both directions on bias issues. (Pet. 14, 15, 22). This case is distinguishable from Respondent White's case because, unlike the trial court in *White*, the Ohio Supreme Court specifically noted that the *Williams* trial court *did* question the jurors and engage in actual fact finding. *State v. Williams*, 679 N.E.2d 646, 654 (Ohio 1997) (noting that it was in response to the trial court's questioning that Juror Eddleman "indicated that she understood the balancing process for aggravating circumstances and mitigating factors and agreed that she could participate in that process, weigh the evidence fairly, and make the appropriate recommendation." *Id.* "Finding no abuse of discretion," the court concluded, "we therefore defer to the trial judge's discretion to determine whether Eddleman could indeed follow the law and be fair and impartial." *Id.* at 654-55).

Moreover, the Supreme Court in *Morgan* held that answers to "general questions of fairness or impartiality" cannot negate a statement by the prospective juror that he or she would automatically vote for death. *Morgan*, 504 U.S. at 735, 112 S.Ct. at 2233. In denying Williams' claim, the Ohio Supreme Court took specific reasoned note of the record assessing that the trial judge's questions were "more than general inquiries regarding a juror's ability to be fair and impartial. Instead, the judge fully explained the penalty stage, the law of mitigation and aggravation, and the corresponding penalties." *State v. Williams*, 679 N.E.2d at 655.

Similarly, in *Martini v. Hendricks*, 348 F.3d 360 (3rd Cir. 2003), a case upon which the Petitioner Warden draws extensive support, (Pet. *passim),* there is a distinguishing factual difference in the trial court proceedings, which significantly impacts the validity of the deference

given by the state's highest court to the trial court's factfinding. As White's Statement of Facts indicates, the vast majority of Juror Sheppard's articulated statements indicated her open bias and admitted inability to remain fair and impartial. As the Sixth Circuit noted upon review of her entire voir dire, it was only her minimal "cursory" responses to leading questions that formed the substance of Sheppard's 'fair and impartial' comments.

By contrast, the *Martini* decision affirms the deference to be given the trial court in an entirely different context, noting that the question confronting the court is "how to interpret the "think so's" and the "I guess so's," *which constitute the bulk of [Juror] Vladyka's affirmative responses*." *Martini*, 348 F.3d at 366-67. (emphasis added). The 'bulk' of Sheppard's clearly articulated answers did not require any such 'interpretation' by the Sixth Circuit. *Martini* is inapposite to the case before this Court.

III. Conclusion.

In providing sentencing phase relief, the Sixth Circuit Court applied clearly established Supreme Court law informed by clearly established guiding principles of review. The Sixth Circuit engaged in proper review of this issue, considered all interpretations of Sheppard's comments consistent with the context and totality of her other comments, and determined in a manner consistent with clearly established Supreme Court precedent that she was in fact biased. However, the Circuit Court did not end its analysis there. The Court, clearly cognizant of the AEDPA standards of review, specifically identified the proper standards, stated that those standards were being applied, and that the state court judgments were "contrary to or an unreasonable application of Supreme Court precedent." (Petitioner's App. 42a). It is axiomatic that when a court cites the law, claims to apply the law, analyzes the facts under the law, it is presumed that the court actually is following the law. "There is no principle of law better settled, than that act of a court of competent

jurisdiction shall be presumed to have been rightly." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). The Circuit Court specifically cited the AEDPA standards of review as generally applying to Mr. White's case and/or to the specific issue of juror bias eight separate times. (Petitioner's App. 2a, 5a, 6a, 32a, 35a, 41a, 42a).

For the above stated reasons, Mr. White requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinion. The Sixth Circuit's decision creates no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does it provide any other reason to warrant revisiting this well and clearly-established area of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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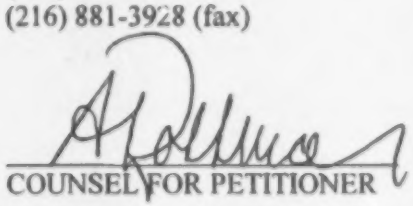

COUNSEL FOR PETITIONER

No. 06-128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, WARDEN,

PETITIONER,

-vs-

MAXWELL D. WHITE, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

CERTIFICATE OF SERVICE

I, Alan C. Rossman, a member of the Bar of this Court, hereby certify that on this 23rd day of August, 2006, a copy of the foregoing Brief in Opposition Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, Motion for Leave to Proceed In Forma Pauperis, and Affidavit of Indigence were deposited in a United States Mail Box, First Class Postage Pre-Paid, pursuant to Rule 29.3 to Douglas Cole, State Solicitor, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215.

I hereby certify that all parties requiring to be served have been served.

ALAN C. ROSSMAN
Counsel of Record

No. 06-128

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APPENDIX

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FILED IN COURT OF APPEALS

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JOYCE KNIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

IN THE COMMON PLEAS COURT OF ASHLAND COUNTY, OHIO

STATE OF OHIO,	)	
Plaintiff,	)	
-vs-	)	96-CRI-07366
	)	96-COA-01182
MAXWELL D. WHITE,	)	Voir Dire
Defendant.	)	

APPEARANCES:

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ROBERT P. DESANTO
Ashland County Prosecuting Attorney

For the Plaintiff

INSCORE, RINEHARDT, WHITNEY & ENDERLE, by
Robert H. Whitney

INSCORE, RINEHARDT, WHITNEY & ENDERLE, by
R. Rolf Whitney

For the Defendant

BEFORE THE HONORABLE ROBERT E. HENDERSON
JUDGE

June 10, 1996

VOLUME I

Carol A. Jung
Registered Merit Reporter
142 West 2nd Street
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COPY

THE COURT: Service as a juror is one of the most important and valuable civic duties which you can perform. Trial by jury is one of the most valuable rights that all of us possess in this country. And the preservation of this right is strengthened by your willingness to respond to this call for jury service.

It is recognized that each of you may be making some sacrifice by being present today. On behalf of this Court and of this community, I commend you and I thank you for your public-spirited activity by being here today.

Ladies and gentlemen, as prospective jurors, you will be placed under oath or affirmation, and counsel and the Court will question you to determine your abilities to be fair and impartial in this particular case.

The questions that will be put to you are not designed to pry into your personal affairs but to discover if you have any knowledge of this case or any preconceived opinions which you cannot lay aside or if you've had any experience in your own personal or family lives that might cause you to favor one party or the other. These questions, then, are necessary to assure each party a fair jury.

I'm going to ask that all of you, including

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the 12 in the jury box, rise at this time, raise your right hands, and the clerk of this Court will administer your oath before the voir dire examination.

THE CLERK: (So done.)

THE COURT: You may be seated, ladies and gentlemen. Now each party to this lawsuit is entitled to jurors who approach the case with open minds and agree to keep their minds open until a verdict is reached.

Jurors must be free as humanly possible from bias, prejudice or sympathy, and not influenced by preconceived ideas either as to the facts or the law.

You will be receiving the facts from the witnesses who testify from this witness stand, instructions as to the law will be given to you by the Court, and it is your sworn duty to accept and to apply the instructions that are given by the Court.

Now you have been summoned here this morning as prospective jurors to hear a criminal case. The case is styled the State of Ohio vs. Maxwell D. White, Jr., and it's been given the Case No. 96-CRI-07366.

The charges include aggravated murder with death-penalty specifications and a firearms specification, having weapons while under disability and abduction with a firearms specification.

This week 12 of you are going to be selected to hear this case. There will be three alternate jurors also selected.

The Court and counsel, as I've indicated, are going to be conducting a process that is known as a "voir dire" examination V-O-I-R D-I-R-E. Those of you who may be French know that comes from the old French and means simply to tell the truth.

You are expected, therefore, to answer the various questions put to you by the Court and by counsel truthfully.

Now the Court is going to have an opportunity to ask you a series of questions. The attorneys for the parties, likewise, will have an opportunity to ask you a series of questions.

Since this is a case that contains death-penalty specifications, we will sometime during the selection of the jury individually voir dire each one of you upon that particular issue.

Now you and I today are in the United States of America, and we have the right to a jury trial. When I say "we," each and everyone of us has the right to a jury trial. And our civic duty requires each of us as citizens to be available to perform our civic duty. And the civic duty that we are talking about this morning is

jury duty service.

Now our system, although not perfect, works. It's designed to protect you and each one of you should we, you or I or any of us be charged with a crime. And it's designed to protect our society so that we can maintain the freedoms that other peoples are at this moment fighting for throughout the entire world.

Your willingness, then, to serve helps maintain this system and but for which the system would not be long maintained.

And while there may be reasons and good reasons why you could not sit in this particular case, we'll be discussing those matters.

We'll ask you to consider in your own mind the importance of this matter to the persons involved, the importance of this matter to the community, the importance of this matter to you as citizens and ask you not, not to lightly request to be excused from this important civic duty.

Now in a criminal case the State of Ohio is the Plaintiff. And the person or the party -- and they're designated the person or the party to bring this action. All criminal matters in the state of Ohio are brought by and in the name of the State of Ohio.

The local representative of the State of Ohio

in each county is the prosecuting attorney. Now the prosecuting attorney in Ashland County is Mr. Robert P. DeSanto.

I'm going to ask him to stand and let you take a look at Mr. DeSanto and advise the Court whether any of you are related to Mr. DeSanto or socially acquainted with Mr. DeSanto.

I take it from your respective silence that none of you are either related to or socially acquainted with Mr. DeSanto.

Has Mr. DeSanto ever done any legal work for any of you as a private attorney? All right. Let's start in the first row here in the jury box. No. 5. Is it Mrs. Gast?

THE JUROR: Yes.

THE COURT: Can you tell us what Mr. DeSanto, what legal work he might have done for you?

THE JUROR: Handling a malpractice suit for us right now.

THE COURT: He's in the process now of representing you in a malpractice action?

THE JUROR: (Nods yes.)

THE COURT: Anything in that particular relationship that would cause you to have difficulty in being fair and impartial to the Defendant's case as well

as to the prosecution's case?

THE JUROR: I would hope that he was a good attorney. I find it hard to go against him being that he's working for me, and I hope he's a good attorney.

THE COURT: Do you feel that because he at the moment at least is representing you that you'd be more inclined to vote in his favor than you would in the Defendant's favor.

THE JUROR: (Nods yes.)

THE COURT: You're excused, Mrs. Gast. Thank you very much for coming. Let's substitute the next juror in line, please.

THE CLERK: Sheryl Kaufman.

THE COURT: Did we have other hands -- yes, ma'am. Your name?

THE JUROR: Sheila Chronister.

THE COURT: What was it Mr. DeSanto represented you in?

THE JUROR: He handled the adoption of our two children and also did our wills.

THE COURT: All right. Anything in that particular relationship that would cause you to give more weight or less weight to the cause that he represents here today?

THE JUROR: No, sir.

THE COURT: You can set that aside --
THE JUROR: Yes.
THE COURT: -- and listen to the evidence as it's presented in this courtroom and then render a fair and impartial verdict for both parties?
THE JUROR: Yes, sir.
THE COURT: Anyone else in the jury box? Going to the back of the room.
THE JUROR: He handled my divorce.
THE COURT: And your name?
THE JUROR: Lesa McConnell.
THE COURT: Anything in that particular relationship that would cause you to give more weight or less weight to the cause that he represents here today?
THE JUROR: No.
THE COURT: You can set that aside, listen carefully to all the evidence, and then render a fair and impartial verdict for both parties to this case?
THE JUROR: Yes.
THE COURT: Thank you. Anyone else? Your name, please?
THE JUROR: Dorothy Taylor.
THE COURT: All right.
THE JUROR: An injury due to an automobile accident he represented me.

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THE COURT: And there's no way, obviously, of postponing those, correct?

THE JUROR: Well, at her age, I would rather not.

THE COURT: Ladies and gentlemen, I propose to excuse this prospective juror?

MR. ROBERT WHITNEY: Judge, I have no objection to Mrs. Johnson being excused. Thank you.

THE COURT: All right. Mrs. Rogers.

MS. FRANCESCONI-ROGERS: No objection.

THE COURT: Pardon?

MS. FRANCESCONI-ROGERS: No objection.

THE COURT: You're excused, Mrs. Johnson. Thank you for coming. Call the next juror in line for that seat.

THE CLERK: Your Honor, No. 17, 18, 19 were excused. We will go to Judith Cannon.

THE COURT: Any other hands up in the jury box?

THE JUROR: We do have a vacation coming up on the 28th of this month. It is a camping trip down southern Ohio for all my family. But I possibly could get out of that.

THE COURT: All right. For the time being, we're going to pass that matter.

have indicated also on your questionnaire that you have had a bad experience with a gun; is that correct?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: And is that still how you want your answer to read?

THE JUROR: Yes, I had a bad experience with a gun.

MS. FRANCESCONI-ROGERS: When did that incident occur?

THE JUROR: When I was 12.

MS. FRANCESCONI-ROGERS: Is there -- can you tell us a little bit about it in a general nature?

THE JUROR: I was left at home with my brother and sisters to watch over them. And I was in my mother and father's room. I got curious about her pistol that they had. And I accidently -- it went off.

MS. FRANCESCONI-ROGERS: Is there -- back up a little bit. There will be testimony in this case that there were weapons involved on January 18th and January 19th of 1996.

Is there anything about the fact that you've had that bad experience and that you're going to hear testimony with regard to guns and it will be the State's testimony that people were hurt and killed with guns that make you unable or make you feel as though your

ability to sit in this case is going to be substantially impaired or that you're going to be prevented from following the law because of your experience?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: You think you can set aside, then, what happened to you when you were 12 and evaluate this case just on the evidence as it comes from the stand, the exhibits and the stipulations?

THE JUROR: Yes. It was just an error on my part.

MS. FRANCESCONI-ROGERS: Thank you Mrs. Dennison, I also have a question with regards to the statement that you didn't know if you were qualified to judge anybody else. You've been here today, you've looked around and you've seen the other individuals that are here.

As you sit here today, is there any reason that you know of that would make anyone else here any better qualified than you are to evaluate the evidence in this case?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Do you think that you would be able to listen to the testimony and render a verdict -- and it could happen to be a guilty verdict. In this case, do you feel, knowing yourself and your

to totally ban the use, ownership, control of firearms?

THE COURT: You've got eight also behind you. May be down to seven now.

MR. ROBERT WHITNEY: Does that cause anyone a problem? Do you belong to any group or organization whose principle is to ban the use or possession of firearms?

Knowing that there will be testimony about firearms or use of firearms in this case, do any of you have any feeling towards firearms that would cause a problem, a hysteria to the extent that you couldn't be fair and impartial if you're selected to serve as a juror here today?

Mrs. Sheppard, you had indicated, in a response to a question by Mrs. Rogers, that you apparently watched or followed the O.J. Simpson -- I guess it's State vs. Simpson or California vs. Simpson, the O.J. Simpson, we'll call it, and apparently you did so for a period of time?

THE JUROR: Off and on.

MR. ROBERT WHITNEY: Off and on. And I think you said something to the effect that you came to some conclusion one way or the other and you didn't watch it anymore?

THE JUROR: Right.

MR. ROBERT WHITNEY: At this trial I can tell you is not going to go on as long as the O.J. Simpson trial, okay?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Are you going to be able to sit for a week, 10 days, two weeks, perhaps three weeks, and keep an open mind and listen to all the evidence that will come forth in this case and then base your verdicts upon the evidence that you hear here in the courtroom and the law that applies to that evidence that Judge Henderson will give to the jury at the conclusion of the evidentiary part of the case?

THE JUROR: To be honest, when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there.

MR. ROBERT WHITNEY: Okay. And you understand that what the TV and the newspaper and so forth say is not -- it could be, you know, somebody talking to this person and his interpretation after talking to that person and so forth, and it may be something other than what actually happened that was reported in the paper?

THE JUROR: To a certain degree I agree on that, but with all the police officers and that that

were involved in this, I really feel that he did do it.

MR. ROBERT WHITNEY: Okay. Let me ask it this way, Mrs. Sheppard. We have entered a plea of not guilty to the charges as set forth in the indictment. Okay. That is not to say that I or my son Rolf or both of us are here trying to tell you that Max White is not guilty of anything. Do you understand?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: We've entered not guilty pleas to charges in the indictment. That's not to say that he may be guilty of something other than what is set forth in the indictment as stated, a lesser included offense. Okay.

In other words, this is not a case where somebody is going to find a glove and Max is going to be asked to put a glove on, you know, like the O.J. trial. I guess that was some big thing in there. Nothing like that.

He's guilty of something in this. I'm not saying he's guilty of what he's charged with. I'm sure he's guilty of some offense that falls within the classification of a lesser included offense. Okay. That's still not going to --

THE JUROR: I still feel -- I mean I will be willing to listen to everything, but I still feel too

strong about this.

MR. ROBERT WHITNEY: Okay. In other words, you would require, as I said earlier, maybe me to put on the old harness and start plowing uphill right from the get-go, so to speak, and anything I say is not going to change your mind?

THE JUROR: I'm afraid not.

MR. ROBERT WHITNEY: Well, I appreciate your honesty and candor in telling me that you have such an opinion and nothing that I'm going to be able to do or my client is going to be able to do would change that from the starting point.

Judge, again, in order to conserve time, I would challenge Mrs. Sheppard for cause.

THE COURT: Any objection, Mrs. Rogers?

MS. FRANCESCONI-ROGERS: I'd like to make inquiry, Judge --

THE COURT: All right. You may.

MS. FRANCESCONI-ROGERS: -- before you rule. Thank you.

THE COURT: We'll hold off ruling until you've had an opportunity.

MS. FRANCESCONI-ROGERS: Thank you.

MR. ROBERT WHITNEY: Thank you, Mrs. Sheppard.

Are any of the other -- or are any of the

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other prospective jurors that are seated here now that as you think and reflect -- I know you haven't heard any evidence in the case. I understand that.

But having heard what you have heard, having heard the indictment read to you, other questions or comments of other jurors, do any of you have a problem now starting this case as a fair and impartial and an unbiased juror?

You don't have to be ashamed of it if you do have such an opinion. As I stated earlier, we're humans. We form opinions. We form conclusions. Sometimes they can be changed and sometimes they can't. We all have our own biases and our own prejudices. We know that.

And, again, the only way we can find out about it -- we can't look into your minds. You have to say something if you have a position such as that. You don't have to be ashamed of it if you have a conviction such as that.

Any of you have any problems right now other than what Mrs. Sheppard has told me? Yes, ma'am.

THE JUROR: I'm not sure this is the appropriate time, but I don't want to not say what -- I don't think I have any problems with being fair at this level in terms of... But if when this section of the

trial is over, if there needs to be a second sitting, I would not totally be unbiased in terms of what the law states.

January 19th happens to be my daughter's birthday. So in terms of making decisions at that level, I can't see the -- I don't know how to phrase it.

MR. ROBERT WHITNEY: Well, we're going to go further into that, Mrs. Ross. We're not going to do it, as I understand it, at this stage. Am I correct, Judge?

THE COURT: That's correct.

MR. ROBERT WHITNEY: And I appreciate you're bringing that up at this time. And when we get to that next stage of voir dire examination of jurors and we'll take that up further. I appreciate your bringing it up. Anyone else?

Have any of you ever sat down or maybe not sat down, have any of you ever had the occasion to discuss this case with family, fellow workers, friends? Any reason at all that may have come up and you've had some discussion. Mrs. Chronister?

THE JUROR: Yes, sir.

MR. ROBERT WHITNEY: You have?

THE JUROR: Yes.

MR. ROBERT WHITNEY: I'm not going to ask you

who you discussed it with or what your discussion was. I'll merely ask as a result of those discussions, Mrs. Chronister, did you form an opinion or conclusion as to what the ultimate decision in this case should be?

THE JUROR: No, sir.

MR. ROBERT WHITNEY: Mrs. Robert R. Ross?

THE JUROR: Same with me.

MR. ROBERT WHITNEY: It comes out in the paper, you hear it on the radio, you see it -- see it and hear it on TV. It's something that people will discuss. But, again, as Mrs. Chronister and Mrs. Ross, you didn't form any ultimate decision as to -- or any decision as to what the ultimate conclusion in this case should be?

THE JUROR: No.

MR. ROLF WHITNEY: Anyone else? Yes, ma'am, Mrs. Howman.

THE JUROR: I've discussed it with family. They haven't swayed me as a juror.

MR. ROBERT WHITNEY: If you were selected to serve, Mrs. Howman, we'll say that there's evidence presented that takes five, six, eight, ten days, whatever, and you retire to the jury room to deliberate and somebody brings something up that maybe didn't come out in the evidence, would you tend to try to reflect

back on what you discussed in order to supply that missing information to the juror who asked that question, or could you put your discussion out of your mind, decide this case on what you hear and see here in the courtroom by way of evidence?

THE JUROR: I would decide the case on what I hear here in the courtroom.

MR. ROBERT WHITNEY: Okay, fine. Someone else had their hand up.

THE JUROR: I would -- almost anybody would say they made some comment on it when they read the case in the newspaper, and everybody would say you can see that the paper maybe would lean one way or the other.

But my understanding is what we heard before, that's the story. What we we're hearing now is what we're supposed to take into account; is that right?

MR. ROBERT WHITNEY: When the jury is seated, there will be 12 people, Mrs. Smith, who will decide what the evidence is. I don't decide what the evidence is.

I try to present evidence on behalf of my client. Mrs. Rogers will present evidence on behalf of the State of Ohio. But not what I say, not what Mrs. Rogers says. There will be 12 minds who will ultimately have to determine what the evidence is and

what the facts are, 12 separate conclusions.

THE JUROR: So really anything that I saw on the news or heard on the radio is irrelevant to what we're doing here?

MR. ROBERT WHITNEY: Yes, ma'am. Can you follow, if you were to accept that proposition that this case is to be decided here not by what the Mansfield News Journal says, not by what the Cleveland Plain Dealer or Ash -- I think it's Ashland Times Gazette or what the TV stations say or what the radio commentators. Twelve people will decide and make the ultimate decision in this case based on what they hear and see here, okay?

THE JUROR: All right.

MR. ROBERT WHITNEY: Any problem with that?

THE JUROR: No, I just wanted to make sure that I understood everything clearly.

MR. ROBERT WHITNEY: Thank you. Anyone else have a problem with any discussions you may have had? I'm sorry, yes, sir. Your name?

THE JUROR: Dan Jones.

MR. ROBERT WHITNEY: Mr. Jones.

THE JUROR: I've discussed it before --

MR. ROBERT WHITNEY: Okay.

THE JUROR: -- during work.

MR. ROBERT WHITNEY: All right. Anything in

those discussions that would cause a problem if you were selected to serve as a juror here? I say "today." It's going to be today and the days following. Anything that would cause you a problem as a result of having discussed that with fellow jurors or --

THE JUROR: I have not formed an opinion.

MR. ROBERT WHITNEY: Well, the opinion -- I'm not going to ask you which way you formed an opinion. But I'll ask it this way.

Again, I'll state the example I used. Am I going to have -- back in the old days we put the harness on the horse and plow. And nowadays you hook the tractor up.

But in any event, when I'm driving the tractor or when I'm putting the harness on the horse, am I on behalf of Max White going to have to start plowing uphill right away because of the opinion or conclusions that you have?

THE JUROR: Probably somewhat, yeah.

MR. ROBERT WHITNEY: Well, I appreciate your answer and I appreciate your honesty and candor. Do you understand we have to start with whatever you think of Mr. White?

I don't care what you think of me, because I'm not on trial. It's not my trial. It's Max White's day

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in court; it's the State of Ohio's day in court. We have to, whether we like it or not, start as evenly, as level as we can.

If I'm going to have to start out trying to change your mind, and that's not what the law is, okay?

THE JUROR: All right.

MR. ROBERT WHITNEY: And anything I say or do before we start, I'm not going to get that opinion or that conclusion out of your mind?

THE JUROR: Probably not.

MR. ROBERT WHITNEY: Okay. I would, Judge, to save time -- I understand Mrs. Rogers will have time to talk -- I would challenge Mr. Jones at this time.

THE COURT: All right.

MR. ROBERT WHITNEY: Yes.

THE JUROR: I agree with what he said, everything he says. I have formed an opinion. You're going to have to work awful hard.

MR. ROBERT WHITNEY: I would have to work double hard to change anything?

THE JUROR: Right.

MR. ROBERT WHITNEY: All right. I appreciate you're telling me.

MS. FRANCESCONI-ROGERS: I'm sorry, Mr. Whitney. Could we have your name?

MR. ROBERT WHITNEY: Yes. Your name, please?

THE JUROR: Sandy Bates, 33.

MR. ROBERT WHITNEY: Thank you. Nothing I'm going to be able to change that?

THE JUROR: No, I don't think so.

MR. ROBERT WHITNEY: Again, Judge, we would challenge juror No. 33.

THE COURT: So noted. And we'll rule after Mrs. Rogers has an opportunity to examine.

MR. ROBERT WHITNEY: Thank you. Yes, ma'am. You held up your hand and kind of nodded your head. I was not paying attention. I could see it when I was talking to Mr. Jones.

THE JUROR: It's an opinion with someone I work with, as you say not to discuss who it was. I have a very definite opinion.

MR. ROBERT WHITNEY: And nothing I'm -- I could stand here all day and talk to you, but I'm not going to be able to change it?

THE JUROR: No.

MR. ROBERT WHITNEY: Your name, ma'am?

THE JUROR: Mariam Cunningham.

MR. ROBERT WHITNEY: I appreciate your honesty and your candor in telling me that.

Judge, again I would challenge -- I'm not mad

at you when I say "I challenge you for cause," you understand? We're all human beings and we all have our ideas and so forth. I appreciate your candor.

THE COURT: The challenge is noted.

MR. ROBERT WHITNEY: Anyone else have a problem because of any discussions you may have had with anyone talking about the case?

Mr. Higgins, let's assume just for a few minutes here you've been selected to serve as a juror in this case and you've heard all the evidence and the law as given to you by Judge Henderson and you've retired to the jury room to begin and are deliberating.

Let's assume further that you find that after deliberation you discover that what you feel to be a sound, reasonable, logical conclusion or opinion that you formed in your mind differs from 10 or 11 of the other of your other fellow jurors.

Would you tend to give up that opinion, that conclusion, just by the sake of numbers alone?

THE JUROR: No.

MR. ROBERT WHITNEY: I don't mean you should be bullheaded and not discuss the case with your fellow jurors. I'm not advocating that or telling you that. All I'm just asking numbers alone.

THE JUROR: No.

MR. ROBERT WHITNEY: Mrs. Nixon, how about you?

THE JUROR: No.

MR. ROBERT WHITNEY: Would you just give up because of numbers or maybe because it's getting dark outside or late out at night or you're getting hungry or tired?

THE JUROR: No, it's got to do with the rest of a person's life.

MR. ROBERT WHITNEY: Again, I'm not telling you to be bullheaded because you think one way and not to discuss it.

Mr. Frye, I know you don't know that much about the case. I know you know what the charges are here and you've heard talk here this morning about ideas, opinions and so forth.

Let's assume, Mr. Frye, that the tables are switched here and today we're here talking about the State vs. Charles Frye and you're seated over here at this table where Max White is with your attorney.

Would you be comfortable knowing what you know, feeling what you feel, your present state of mind, your emotions, would you feel comfortable having a person such as yourself in your present state sit as a juror and decide your fate in your case if the tables

were switched?

THE JUROR: I have a couple issues. One of them is my son-in-law is a deputy sheriff in Medina County. And I didn't understand what this case was about till I walked in this morning.

And my daughter, for the first time pregnant with twins, and I'm struggling with that issue.

And the other thing is that whatever I would feel in that situation, whatever my anger or frustrations or whatever is, however strongly I felt, I simply -- I'm simply opposed to capital punishments. But there may be other kinds of issues too.

MR. ROBERT WHITNEY: Well, that point we'll get to at a later state in voir dire. Go ahead.

THE JUROR: Your question was if I were the accused?

MR. ROBERT WHITNEY: Tables were switched and the person such as yourself, your state of mind, what your feelings are, so forth, would you be comfortable in having a person such as yourself sitting on your jury and decide your fate, your guilt, your innocence?

THE JUROR: Yes.

MR. ROBERT WHITNEY: How about Mrs. Sheppard? Well, you and I have already talked.

Mr. Marker, how about you? If the tables were

switched here today and it was State vs. Marker and you were charged with something or other -- it doesn't have to be what the charges are here today -- would you feel good about having a person such as yourself with your feelings, your emotions, your knowledge, your training, your experience being on your jury to decide your fate?

THE JUROR: Yeah.

MR. ROBERT WHITNEY: Thank you, sir. Mrs. Chronister, same question.

THE JUROR: I wouldn't be truthful now for three reasons. No. 1, my husband has MS, and he's on a special drug now. He has to have an injection every other day. He has some reactions to that. And my concern would be every other day how is he doing during the day?

No. 2, I'm a student in the evening. I go to class two nights a week. And in July I'll be going two nights a week plus three weekends. So my thoughts, you know, my homework, on tests, on that type of thing.

And No. 3, I'm sitting here knowing that my employer wants me back there. I cover -- I am the backup for four other people in my department. Two of those are on vacation today. One is off all week.

Also I do all the month-end closing and fiscal-year closing, which is at the end of this month

and first three weeks of July. And I would want somebody that would totally have their mind on the case.

MR. ROBERT WHITNEY: What you're saying is that you're going to be -- because of these and I understand because of these factors that you've explained, you're going to have a hard time concentrating on what's going on here?

THE JUROR: Total concentration, yes.

MR. ROBERT WHITNEY: Okay, fine.

THE COURT: Mrs. McConnell, how about you? Same question. Knowing what you know, having heard what you heard, you know better than I, your training, your education, what your emotions, your feelings are, if the tables were switched here today, would you want a person such as yourself sitting on your jury to decide your fate?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Thank you. Mrs. Baker, same question.

THE JUROR: Yes.

MR. ROBERT WHITNEY: Would you want somebody such as yourselves on your jury?

THE JUROR: I think so.

MR. ROBERT WHITNEY: Anyone else have a problem? Mrs. Bray?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You would want a person such as yourself --

THE JUROR: Yes.

MR. ROBERT WHITNEY: -- on your jury?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Thank you. Judge, with the exception of the challenges for cause and Mrs. Chronister's problem which was brought up, I'm "passing for cause," quote-unquote, at this point.

THE COURT: All right. You may inquire, Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Mrs. Sheppard, you had indicated, I believe, and I'm not going to be able to quote you exactly, I don't think, but based upon what you have read and the police officers involved and the evidence, that you reached a conclusion. I think that's basically what I've heard you say.

And you used the word "evidence." Do you understand, though, as you sit here today and after hearing what you've heard this morning, that you have not heard any of the evidence yet in this case?

THE JUROR: I understand that.

MS. FRANCESCONI-ROGERS: Do you understand that what the newspapers might have said happened may

not be the same thing that you're going to hear from the witness stand happened?

THE JUROR: Right.

MS. FRANCESCONI-ROGERS: Let's assume for a minute you heard from the witness stand something completely different than what you thought happened happened.

Would you be able to set aside that opinion that you have now and base your decision or your verdict on instead what you heard from the witness chairs -- the witness seat and the testimony presented in this trial?

THE JUROR: I feel I could, once I heard all the evidence, that as I feel strongly I'm going to hear the evidence that I believe in now.

MS. FRANCESCONI-ROGERS: Okay. But you're telling me if you heard something differently and heard that something you expected to be there isn't there, for example, that you would be able to set aside any opinions you might have now and decide this case only on the evidence as it's presented in this courtroom?

THE JUROR: I feel I could, yes.

MS. FRANCESCONI-ROGERS: In other words, what we're really saying is, anything that comes out of this courtroom has to take precedence and has to be much more

important that what you might have read or heard before this date in time.

Are you able to right now say to us that's the way I'm going to look at it; what comes before me here is what's important, not what I know up until this point in time? Can you tell us that?

THE JUROR: Yes, I can.

MS. FRANCESCONI-ROGERS: I'd address the same questions basically to Mr. Jones, Miss Bates and Miss Cunningham. I understand that at this point in time you've all read or heard certain things.

But assuming that when you hear testimony in this case that things aren't maybe what you heard them to be or read them to be, will you be able to reach a conclusion in this case and a verdict based on the evidence that comes forward in this courtroom as opposed to what you might now think is the case or what you might now believe to be the evidence?

Mr. Jones, I'll ask you first. Will you be able to set aside what you heard before and consider what you hear in this courtroom to be the important evidence? Because there is none other really.

THE JUROR: I'd like to be able to say yes, but I'm afraid I still have that thought in the back of my mind.

MS. FRANCESCONI-ROGERS: I'm going to ask you to assume the same things that I asked Mrs. Sheppard to assume. Assume something you read and believe to be the case is not the case.

Would you be able, then, to set that aside and say maybe that newspaper wasn't right or that radio station wasn't right and I need to determine this verdict on what the evidence is and what people tell me they saw and heard and know to have occurred in those early-morning hours of January 19th of 1996?

THE JUROR: I'm not sure. I'm not sure if I could or not.

MS. FRANCESCONI-ROGERS: All right. Would you consider -- and, again, we're just trying to get at what your position is at this point in time.

As you sit here today, are you able to assure us that the true evidence, the evidence you hear from the witness stand in the courtroom, will weigh much more heavily in your minds than anything you've heard or discussed at this point in time?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Ms. Bates, I'm going to turn to you and ask you the same type of things. It may come to be that what your preconceived idea right now is of the evidence may not be what you hear the

evidence is from the people who know the circumstances and the facts of the hours in question.

Would you be able -- let's say there was a difference between them -- to set anything that you've read and heard aside and base a verdict on what you hear come out of this courtroom in the next few weeks?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Would you be willing to assure the State of Ohio and the Defendant that it is in fact the evidence that comes from the stand that is important and not the facts as you've concluded them to be now based on what other portions of the media that you might have read or heard? Can you assure us you can do that?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Mrs. Cunningham, I'll turn to you. Again, knowing and not expecting anything different than people to be upset that there's a death and the death of a law enforcement officer, are you able to set aside what you read and what you know and what you've heard and say to us I'm going to make my decision -- and it may be the same one down the line. No one is asking you for that now.

But I'm going to make my decision not on what I preconceived up until today, but I'm going to make it

on what happens in this courtroom in the next week or two; can you tell us that you'd do that? I don't know the answer.

THE JUROR: Yes, I think so.

MS. FRANCESCONI-ROGERS: And if the Judge would instruct you, as I expect he would in the past, that you need to set aside all of those ideas or thoughts or things you've read because they are not evidence, are you able to set those aside and say to yourself or say to us I'm going to determine this case from what I find to be credible evidence during the course of this trial?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Judge, I would object to any of them being excused for cause.

THE COURT: Do you wish further examinations?

MR. ROBERT WHITNEY: Yes, Judge, if I could, please. Thank you.

THE COURT: You may.

MR. ROBERT WHITNEY: Mr. Jones, I think that when you and I were talking earlier, it was in response to a question -- you correct me if I am wrong, in response to a question I'd asked about if you've had occasion to discuss this case with people, not what the prosecutor was just now talking to you about, what you

read or what you heard.

My question related to discussions with people. And I believe you indicated you talked about this case at work and you had in fact formed an opinion as to what the ultimate decision in this case should be?

THE JUROR: Right.

MR. ROBERT WHITNEY: Remember when we talked about me putting on or hooking the harnesses on the horse and hooking up the tractor, going uphill; is there anything I say here that's going to change your mind? And your answer was no.

THE JUROR: You'd still be starting uphill.

MR. ROBERT WHITNEY: That's what I'm saying. You haven't changed your mind, have you? I'm still going or Rolf and I both for Maxwell are still going to have to start out plowing uphill, right?

THE JUROR: Right.

MR. ROBERT WHITNEY: And I believe, Mrs. Bates and Mrs. Cunningham, the same question to you. And I said to both of you, Can I do anything to change your mind? And you said no. And now the prosecutor has asked you and you said yeah. What's changed your minds?

THE JUROR: I do have an opinion. I have a very strong opinion, but I can listen to the evidence and base my opinion on that and throw everything out

that I've read and that I've talked about and I have talked about it.

MR. ROBERT WHITNEY: Well, if you've formed an opinion, then I'm going to have to do something to overcome that, right?

THE JUROR: Correct.

MR. ROBERT WHITNEY: We're not starting out on a level playing field, are we?

THE JUROR: Okay.

MR. ROBERT WHITNEY: I'm not making fun of you and I'm not trying to insult you, either. I appreciate what you're telling me.

But, you know, if I'm going to have to do something -- you see the burden is on the State of Ohio here. And maybe some people don't like that, but that's the law, that they have to prove everything. All the elements are truth beyond a reasonable doubt.

The Defendant doesn't have to do a thing. He doesn't have to get on the witness stand. He doesn't have to take, you know, testify. He doesn't have to call a witness. I wouldn't even have to stand up here and talk to you. We could just sit here and do nothing. And the burden is still the same, see?

THE JUROR: Yes.

MR. ROBERT WHITNEY: But I'm going to have to

overcome that with you?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: Mrs. Cunningham.

THE JUROR: I do have strong opinions.

MR. ROBERT WHITNEY: I'm going to have to overcome that with you, or the Defendant?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Again, I'm not poking fun at you. I'm not picking on you. I appreciate your candor and your honesty in your telling me what you feel.

Mrs. Sheppard, we had talked earlier, and I'd issued a challenge of cause not because I dislike you or don't like you or mad at you. I'm not. I think you'd indicated that you had an opinion in this case?

THE JUROR: Yes, I do.

MR. ROBERT WHITNEY: Do you still have it as you sit here right now?

THE JUROR: Like what was brought up, I haven't heard the evidence as far as someone sitting up there. Just from the media. And I still do have an opinion about this, and you will have to work hard to change that opinion.

But I am a fair person. And I am willing to listen to all the evidence and then make my final

decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there.

MR. ROBERT WHITNEY: Well, let me ask you a question this way, Mrs. Sheppard. I guess I started asking them to you earlier and I said no, I already talked to you. I won't.

Let's switch the tables now. And let's say it's State vs. Sheppard and you're over here. You're under the gun, so to speak, here today, not Max White, okay.

Now reversing the tables, I ask you as I asked other jurors earlier, knowing what you know and feel, your training, your experience, your emotions, your knowledge, your witnesses, would you want a person such as yourself sitting on your jury deciding your fate?

THE JUROR: Yes, I would, because I'm a very honest person.

MR. ROBERT WHITNEY: I believe you are.

THE JUROR: But I want justice to be seen just like anyone else does.

MR. ROBERT WHITNEY: That's why we are here. I know people, Oh, you're a lawyer. You don't care. All you care about is getting somebody out of this and so forth.

That's not the purpose. The purpose is to see

that they get a fair trial. As I indicated to you earlier, Max White is not going to walk out of this courtroom scot-free, not guilty of anything, I can tell you right now.

And I don't hesitate to tell you he's going to be found guilty of something. It may not be what he's absolutely charged with. It may be here or it may be here (indicating).

But he's entitled to a fair trial on those issues by people who have not formed an opinion or judgment as to what the ultimate decision should be, okay?

THE JUROR: Right.

MR. ROBERT WHITNEY: And you're telling me whatever your opinion is right now as you sit here, you can look me in the eye and tell me that you can put that aside and decide this case based on the evidence, not what your opinion is or what you feel right now?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You can do that?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: I think you can too. Okay. Withdraw our challenge for cause on Mrs. Sheppard, Judge.

Renew it on Mr. Jones, Miss Bates, Miss

Cunningham.

MS. FRANCESCONI-ROGERS: Judge, may I make inquiry one more time?

THE COURT: You may.

MS. FRANCESCONI-ROGERS: I'm just going to address you folks in the back now. I believe that you will be instructed by the Court that this Defendant, and I think Mr. Whitney has made mention of it, is presumed innocent as he sits today in this courtroom.

And that presumption remains with him until and unless the jury, after deliberations, reaches a different verdict. In other words, that they might find him guilty.

Now the Court would instruct you that whatever opinions you have today basically have to be thrown out, cast aside, and he must be afforded the presumption of innocence as he sits here today.

So I guess I need to ask you, Mr. Jones, can you afford him right now a presumption of innocence as he sits in the courtroom today if the Judge instructs you that that's what you are to do by law?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: All right. Mrs. Bates, same question to you?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Mrs. Cunningham?

THE JUROR: That he's innocent?

MS. FRANCESCONI-ROGERS: Yes.

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Would you afford him a presumption of innocence as he sits here today?

THE JUROR: Presumption of innocence?

MS. FRANCESCONI-ROGERS: Yes, meaning under the Constitution, a Defendant is presumed to be innocent as he begins any trial. And that cannot change until the end of the trial when deliberations are had and the jury might find differently and the Court will instruct that that is the law in Ohio.

Do you feel as you sit here today that you can cast aside prior opinions that you might have reached and say as I begin the trial today, I will presume him innocent and listen to the evidence as it comes off that stand?

THE JUROR: Not entirely, no.

MS. FRANCESCONI-ROGERS: All right. Judge, I will withdraw my objection to the for-cause dismissal of Mr. Jones, Mrs. Bates, Mrs. Cunningham, and renew my objection -- I'm sorry, I think Mr. Whitney has withdrawn his to Mrs. Sheppard.

THE COURT: All right. Mr. Jones, you're

excused. Mrs. Bates, you're excused. Mrs. Cunningham, you're excused.

We have reached the lunch hour at this point. And we're going to take the break for lunch at this time.

The Court is advising all of those of you who are still in the courtroom as prospective jurors, do not discuss this case among yourselves or permit anyone else to discuss it with you while you're gone from this courtroom, don't come to any conclusions with regards to any of the issues in the suit, as you're not entitled to do so until you have heard all of the evidence, the law that the Court will give you, and you are in the jury room, deliberating over this case.

The Court will stand in recess until 1:05 this afternoon.

(The time is 12:04 p.m.)

(A recess was taken.)

(Time is 1:14 p.m.)

THE COURT: Now, Mrs. Rogers, on behalf of the State of Ohio, do you have any further questions to ask members of this panel?

MS. FRANCESCONI-ROGERS: I do not, Judge. I would pass for cause on the limited portion of the questioning that we've done to this point.

THE COURT: All right. Mr. Whitney.

MR. ROBERT WHITNEY: Likewise, Judge, no further questions, and would pass for cause for the limited purposes at this point, Your Honor. Thank you.

THE COURT: All right. This particular panel of prospective jurors is to go to the second courtroom to remain there until we need them further, and those who are in the second courtroom are to be brought up for voir dire.

Before the remainder of this panel is brought up, I am instructing the photographers that this particular piece of equipment is to be turned off during the lunch hour and during the recess periods. And also it is to be turned off when there are sidebar conferences.

(Next 65 jurors were brought into the courtroom.)

THE COURT: With regard to the panel that have just been brought into the courtroom, you have been through the general voir diring or questioning of the members of this prospective jury this morning.

This afternoon, counsel for the State of Ohio and counsel for the Defendant will further question you. And I again advise you that the purpose in this questioning is not to pry into your personal affairs but

MR. ROBERT WHITNEY: You would, Mr. Marker, follow -- or listen to the Court's instructions concerning all three options available?

THE JUROR: Yeah.

MR. ROBERT WHITNEY: All right. I have nothing further.

MS. FRANCESCONI-ROGERS: Pass for cause.

THE COURT: All right. Mr. Whitney.

MR. ROBERT WHITNEY: Pass for cause, Judge.

THE COURT: You're excused, and you may go down to the second courtroom again. And have the bailiff, if you will, send in the second juror.

This is Susanne Sheppard. And the attorneys are going to be conducting this phase of the voir dire examination generally referred to as the "death-penalty phase." Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Mrs. Sheppard, we are involved in this type of case in a two-step procedure. The first step involves a phase called the guilty-innocent phase, where the jury will be determining whether or not the State of Ohio has proved the Defendant guilty of the offenses charged.

Depending on what the jury does with that verdict, we may arrive at a second phase of this trial, and the second phase of the trial is what's called the

"penalty phase" of that trial.

Assuming for a moment that the jury gets to the penalty phase of the trial, they will be instructed at that point in time that they must consider -- strike that. That they must weigh aggravating circumstances of the offense against any mitigating factors presented by the Defendant.

Aggravating circumstances being things that I think maybe in layman's terms weigh in favor of a death-penalty verdict with mitigating factors being things that weigh against the imposition of a death penalty.

And the law mandates that the jurors during the penalty phase weigh the aggravating circumstances against mitigating factors in reaching a conclusion about the verdict -- or the sentencing portion of the trial.

The jurors under certain circumstances have a choice with regard to some of the sentences. But there is another circumstance where the jurors wouldn't have a choice. And that is if the jurors during the penalty phase found beyond a reasonable doubt that the aggravating circumstances of the crime outweighed beyond a reasonable doubt the mitigating factors, then they are obligated, they are mandated by law, to return a

recommendation of death to the Court.

Do you think based upon your views and your sentiments that you would be able to follow the Court's instructions with that regard or with regards to that?

THE JUROR: I have mixed emotions on that because I feel -- I ~~am for the~~ death penalty.

MS. FRANCESCONI-ROGERS: Okay. And not suggesting that you can't have whatever feelings you have on the issue, but instead saying to you that the Judge will instruct based upon what the Ohio legislature decided should be factors and the appropriate circumstances for imposition of the death penalty.

And the law sets out certain circumstances where it may be an option for jurors to impose a death penalty, and part of the law reads that certain things must be proved and must be proved beyond a reasonable doubt before that option comes into play.

Are you able to set aside what you feel about the law or you feel should be the law and follow the Court's instructions about when you could impose the death penalty or when you might instead have to go to recommendations such as life imprisonment with 20 years or eligibility for parole after 20 years and eligibility for parole after 30 years; would you be able to set your sentiments aside and follow what the Judge is going to

tell you is required by law?

THE JUROR: I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and to be honest, I don't think I would be fair to the Defendant.

MS. FRANCESCONI-ROGERS: Are you talking about now with regards to potential sentence?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: Is it then -- are you telling us that if the Judge said only under certain circumstances could you recommend the death penalty that you wouldn't be able to follow that and you'd do instead what you wanted to do as opposed to what he told you the law says you could do?

THE JUROR: I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it's a strong enough doubt. I just want you to be aware of it.

MS. FRANCESCONI-ROGERS: Do you understand that there could be a point in time when you'd be asked to sign your name to a verdict form recommending the

death penalty?

THE JUROR: Do I understand that I would be signing something like that --

MS. FRANCESCONI-ROGERS: That you could be, that you could be.

THE JUROR: Yes, I do understand that.

MS. FRANCESCONI-ROGERS: And would you be able to do that?

THE JUROR: I think I could once I heard all the facts. I think I could.

MS. FRANCESCONI-ROGERS: Okay. And when you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?

THE JUROR: Yes. I guess I am trying to say I am in favor of it as long as it's proven that it should be given.

MS. FRANCESCONI-ROGERS: All right. And that would bring up one other thing that I would want to discuss with you. Quite often prosecutors hear that since it is a death penalty that a case needs to be proven beyond all doubt or beyond a shadow of the doubt.

The Court in this case will instruct you that the burden of proof in this case is the same as it is in all criminal cases -- beyond a reasonable doubt.

Are you able to follow that law and hold the State of Ohio to that standard beyond a reasonable doubt and not any higher standard just because it's a death-penalty case?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: I have nothing -- nothing further, Judge.

THE COURT: Mr. Whitney, you may inquire.

MR. ROBERT WHITNEY: Thank you, Judge. Mrs. Sheppard, so you understand, this particular type of case is an unusual case in the sense it's the only one where the jury actually that I can think of right now gets a chance to decide what punishment, what the sentence is going to be. And it's actually -- it's a two-phased or two-pronged proceeding.

And we don't have a chance to discuss with the jurors the penalty part, the penalty phase of it, you know, and wait till we get there and then talk about it. So we have to talk about it now.

What I'm asking is, You do not -- or do you believe that because we're sitting here talking about death penalty that you believe the defense is conceding that the case should get to that point?

THE JUROR: I don't completely understand.

THE COURT: No, I think you need to rephrase

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that. I have difficulty with that question too, Mr. Whitney.

MR. ROBERT WHITNEY: It's a two-pronged case, so to speak. We have the evidence phase, or the guilt-innocence phase, and then we have the penalty phase. We can't wait until we get back the guilt-innocence phase and talk about the penalty phase.

What I'm asking, Do you have an opinion or belief that because we're sitting here talking about penalty phase that we have conceded already and agreed that this is a case that should get to that penalty phase?

THE JUROR: Well, if you have, I don't believe you should have yet because it hasn't been presented.

MR. ROBERT WHITNEY: That's what I'm asking. Do you believe that because we're sitting here talking --

THE JUROR: No.

MR. ROBERT WHITNEY: You understand we have to talk about it now because there's not going to be any break in between where we can talk with you about it?

THE JUROR: Right.

MR. ROBERT WHITNEY: The prosecution has brought up the word I believe "recommendation," that if the State should prove everything beyond a reasonable

doubt, No. 1, the offense, and No. 2, the aggravating factors outweigh the mitigating factors, that the death penalty could be recommended.

Do you understand that it's really more than a recommendation that the jury would make to the Court about the death penalty; in other words, although the word "recommendation" is used, it's for all practical purposes final?

MS. FRANCESCONI-ROGERS: Objection. I don't think that's an accurate statement of law.

THE COURT: If the State of Ohio proves beyond a reasonable doubt that the Defendant is guilty of aggravated murder, including the death specifications, we go to the penalty phase.

And if, again, the jury finds in that phase of this case that the aggravating circumstances outweigh the mitigating circumstances, then it's the Court's opinion of the law, as I have read it, that a jury is required to return a verdict for the death-penalty recommendation.

MS. FRANCESCONI-ROGERS: It's my understanding also, Judge, but I don't believe that that is a final recommendation, which is what Mr. Whitney said. My reading of the law would indicate the Court still then has to reevaluate.

THE COURT: Absolutely. I said that this morning in the general charge.

MS. FRANCESCONI-ROGERS: Well, that was my objection to Mr. Whitney's question.

THE COURT: All right. Now we have thoroughly confused the prospective juror, and I'm going to ask you to rephrase your question again, Mr. Whitney, taking into account what the Court has said, what the prosecution has said.

MR. ROBERT WHITNEY: Do you understand, Mrs. Sheppard, that this recommendation that has been brought up would be a heavy recommendation, a heavy decision on the part of a juror?

THE JUROR: Yes.

MR. ROBERT WHITNEY: All right. Would you consider, Mrs. Sheppard, any mitigation factors, follow the law as given to you by the Court, and consider mitigation factors versus aggravating factors in deciding upon a sentence in this case?

THE JUROR: I don't know. I need it rephrased again.

MR. ROBERT WHITNEY: Okay. We have in the law what's referred to as "aggravating factors," "mitigating factors." The State of Ohio has to prove beyond a reasonable doubt the offense of aggravated murder, the

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offense of the death-penalty specification, and that beyond a reasonable doubt the aggravating factors outweigh mitigating factors that the defense would produce or submit for the jury's consideration.

Would you be willing to consider the mitigating factors versus the aggravating factors?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You indicated early on, Mrs. Sheppard, in this proceeding here that you felt that you could not be fair to the Defendant Max White with reference to the penalty part of this proceeding, if we get to the penalty part of this proceeding.

As you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?

THE JUROR: I think to a certain degree, yes.

MR. ROBERT WHITNEY: That you could not be fair?

THE JUROR: I could not.

MR. ROBERT WHITNEY: In other words, as you sit here now, do you have an opinion as to what you feel the penalty should be in this particular case?

THE JUROR: Like I indicated earlier, if the facts prove that he is guilty, yes, I have a strong belief.

MR. ROBERT WHITNEY: All right. Without hearing any mitigation, without hearing any further evidence?

THE JUROR: I know that completely doesn't feel fair and I know -- I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, but I still have a little bit of doubt. And I think for a person's life, there should not be any doubt whatsoever.

MR. ROBERT WHITNEY: You feel that you should not serve as a juror in this cause because of that?

THE JUROR: What? Yes.

MR. ROBERT WHITNEY: I think the defense will renew its challenge for cause at this point.

THE COURT: You may inquire further.

MS. FRANCESCONI-ROGERS: Thank you.

Mrs. Sheppard, so you understand, I don't think anyone is suggesting that you're not entitled to an opinion on the subject. We all have opinions when we walk in the courtroom.

But the Court is going to tell you, assuming that we get past the guilt phase and the Defendant is found guilty, the Court is going to tell you under what circumstances and after what type of analysis the death

penalty could be imposed.

And the Court is going to tell you that if you found the aggravating circumstances did outweigh the mitigating factors, that the jury must recommend the death penalty.

And on the flip side, the Court will instruct you that if that same jury finds that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating factors, that the jury must then consider the two other options available to them.

If the Court were to give you the instructions about the procedure that you must follow during the penalty phase, could you listen to his instructions and follow them in reaching a conclusion about what the appropriate penalty might be?

THE JUROR: Like I have stated, I feel I could do this, but yet, again, I still have that little bit of doubt that I couldn't.

MS. FRANCESCONI-ROGERS: But you're telling us you feel you could?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: And at this point you're telling us that you're willing to attempt to do that.

THE JUROR: Yes.

MR. DESANTO: Mrs. Sheppard, what all this is really saying is will you obey the law? You've obeyed the law throughout your life, I take it, and this is another time when all of us have to obey the law regardless of what our personal feelings are what the law should or shouldn't be.

The prosecutor has to obey the law and present the evidence as the Court instructs, the defense attorney has to conduct himself according to the law and a juror has to conduct themselves according to the law.

And all that means is you need to obey the instructions to the best of your ability. And that's what we're asking. Can you do that; will you do that; will you obey the law on this matter and follow the Court's instruction?

THE JUROR: When I walked in here today, it was -- I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the real truth.

And if we come to the truth that I feel we're going to, and I hate to see one man's life taken, but in fair honesty, in him taking another life, I think that he should be punished for that, and I'd like to be a

part of that.

MR. DESANTO: Would you obey the law and the Court's instructions?

THE JUROR: Yes, I would.

THE COURT: Any further questions, Mr. Whitney, before I rule on your --

MR. ROBERT WHITNEY: Mrs. Sheppard, I never meant to imply that you were a disobedient person to the law. Never meant to imply that. I don't believe that. I think you're a law-abiding citizen. I don't doubt about that in my mind.

My question is, Are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

THE JUROR: No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.

MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if

you were a juror?

THE JUROR: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

THE JUROR: Yes.

MR. ROBERT WHITNEY: I don't have any further questions.

THE COURT: All right. The challenge for cause is overruled. Thank you, Mrs. Sheppard. You may go back to the second courtroom downstairs. Barbara Smith is the next.

Mrs. Smith, we're in what we call the death-penalty phase of this particular case. And counsel are going to inquire and question you about whether or not you're able to follow the law with regard to the penalty phase of this matter.

You may inquire, Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Thank you, Judge. Mrs. Smith, there are, as the Judge has indicated, two phases to this type of trial. There is a guilt-innocence phase and then, conceivably, under certain circumstances, there is also a penalty phase to this trial.

Whether or not there is a penalty phase

that to him also with regards to tomorrow's.

MS. FRANCESCONI-ROGERS: Judge, before the next juror comes in, I'd like to voice an objection for the record to any more questions or inquiry with regards to what 20 years and life with 20 and 30 means.

I don't think it has any relevancy to the inquiry that we're making, which is can they follow the law with regard to the death penalty.

And I think it's an attempt to educate or lighten the burden or discuss with them what may happen if and when he's institutionalized. So I'm objecting at this point to it being delved into any further.

THE COURT: Now we've done it once, each of you, Mr. Whitney, and I'm going to sustain the objection of the prosecution from after this point.

MS. FRANCESCONI-ROGERS: Thank you.

THE COURT: I want the second jury, gentlemen, the one that we brought up this afternoon, I want them back tomorrow morning at 8:30.

THE BAILIFF: Okay.

THE COURT: This group that we're now interviewing, questioning, I am telling them that they're not to return until they receive a call from the clerk of this court. It may be that they have to come back tomorrow afternoon.

innocent met that punishment.

I know that our law works very hard to ever prevent that, but that's one issue that bothers me.

MS. FRANCESCONI-ROGERS: Okay. Believing, as I think I just heard you say, that you do believe it is a wrong, do you think, then, that you would find it very difficult to vote for that death penalty even if you felt the State had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors?

THE JUROR: I'm thinking of what the Judge said before, that it isn't necessarily just an instruction to the other potential jurors, that it isn't just your belief but it's how the law is right now.

MS. FRANCESCONI-ROGERS: That's right.

THE JUROR: That because of the way the law is right now, I could follow, based on what you instructed me.

MS. FRANCESCONI-ROGERS: Part of what the law also indicates, though, is if a juror has a substantial impairment or difficulty in following that law, that that's something that this group of people needs to know right now.

So I'm going to go back to something Mr. Whitney talked about in his portion of the voir dire

that basically said if you were sitting on the penalty phase, you'd already decided his guilt beyond a reasonable doubt and you'd heard all the evidence on the penalty portion and you came back here, would I already have one foot in the hole that I would have to climb out of because your predisposition would be I don't want to impose that death penalty?

THE JUROR: I'm not a hundred percent sure.

MS. FRANCESCONI-ROGERS: Okay. And that's fair enough. I understand that they're tough questions.

Would you as you sat through the penalty-phase evidence be fighting having to impose that death penalty in your mind; in other words, looking for reasons not to have to impose it?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Judge, I would object to "looking for a reason not to impose it." They're supposed to look for reasons to do it or not to do it. I don't think that's a fair question.

MS. FRANCESCONI-ROGERS: I'll rephrase it then.

THE COURT: It will have to be rephrased. Sustained.

MS. FRANCESCONI-ROGERS: After taking into consideration what the Judge would instruct you you

THE JUROR: Yeah, I'd say that.

MS. FRANCESCONI-ROGERS: Would it be fair to say that as you sit here right now, it would be your hope that you don't have to impose the death penalty?

THE JUROR: Correct.

MS. FRANCESCONI-ROGERS: Judge, I'm renewing it. And I would cite the Court to State vs. Phillips, 74 Ohio State 3rd 72, which indicates that the juror's death-penalty views are cause if they would substantially impair her ability to follow the law. And I'm renewing my motion that she be excused for cause.

THE COURT: Do you want to be heard, Mr. Whitney?

MR. ROBERT WHITNEY: Yes, Judge. I think the juror has indicated as per the questioning it would be difficult for her to do it. I think it would be most difficult for any human being to do it. But I think she's clearly stated in her answers to questions that she would follow the law, she would abide by the law.

Even though she wouldn't like to do it, she could impose the death penalty if in fact the State met its burden and proved its case beyond a reasonable doubt. She would follow the law and the evidence. And although finding it difficult, she would impose the death-penalty verdict.

THE COURT: Let me see your case that you're citing, Mrs. Rogers. Well, the unfortunate problem here is we've really had this both ways.

Now I'm going to go back one more time. If you believed that the State of Ohio had proven that the aggravated circumstances surrounding this crime outweighed the mitigating factors put on by the Defendant, would you be able to sign a verdict recommending to the Court the death penalty?

THE JUROR: Yes.

THE COURT: All right. The motion to excuse this prospective juror is overruled. We'll ask, Ms. McConnell, that you be back at one o'clock tomorrow afternoon into Courtroom 2 downstairs.

Sheila Chronister.

Miss Chronister, we're at that phase that's known as the "penalty phase" in this case.

And we get to that only by assuming that the jury that hears this case finds that the Defendant is guilty of aggravated murder with death specifications attached thereto. So you have to assume that.

If that were the case, then the same jury that heard the guilt-innocent phase of this case would determine the recommendation that is to be made to the Court with regard to the penalty in this case.

At that penalty-phase hearing, the Defendants -- the Defendant would have the opportunity to put on evidence with regard to mitigating factors. That means something that's limited, what has been done here. And the State of Ohio on the other hand would then be able to put on evidence with regards to aggravating circumstances.

In the event you were a member of the jury and the jury determined that the State of Ohio had proven to you by evidence beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, then you would be required to make a recommendation to the Court that the death penalty be imposed.

So that's the question that counsel are going to inquire of you about in this phase. Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Thank you, Judge. Mrs. Chronister, if you in fact did find, as the Judge just mentioned, that the aggravating circumstances outweighed beyond a reasonable doubt the mitigating factors presented by the Defendant, would you be able to recommend what you're required to recommend by law, which is the imposition of the death penalty?

THE JUROR: Yes, I would.

MS. FRANCESCONI-ROGERS: Accompanying that

obligation would be that if that jury recommended the imposition of the death penalty, it would also require that that jury sign their name in writing to a verdict form that would in fact make that recommendation to the Judge that he impose the death penalty.

Do you believe based upon how you feel and what you believe that you would be capable of signing your name to that death-penalty verdict?

THE JUROR: Yes, I feel that if I felt that he was guilty, then I would sign my name.

MS. FRANCESCONI-ROGERS: Okay. And understand that we would have moved out of the guilt-innocence phase, that would be done, and we would have then moved to the penalty phase.

And the legislature has determined that only if aggravating circumstances outweigh beyond a reasonable doubt mitigating factors may a jury recommend that.

The flip side of that is if you don't find that the State has proved that, then you couldn't recommend the death penalty and you would have to go to one of the life-sentence options.

Do you understand what I've explained?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Would you be willing

to follow the Judge's instructions as to the law on those issues?

THE JUROR: Yes, I would.

MS. FRANCESCONI-ROGERS: Sometimes prosecutors hear that because there is a death penalty involved, the State ought to have to prove it beyond all doubt or beyond a shadow of a doubt.

And I will indicate to you that the Court will instruct you that that is not the State's burden. That the State's burden both in the guilt-innocence phase and the penalty phase is proving guilt beyond a reasonable doubt.

Are you willing to follow the Court's instructions and hold the State to the burden of proof beyond a reasonable doubt and not any other standard that you thought might have existed or that you might want to have exist?

THE JUROR: That's hard, because I would want to know beyond a doubt before I would be able to sentence someone to death. I would have a rough time, if there was any doubt at all.

MS. FRANCESCONI-ROGERS: Okay. I think the Judge would instruct you, though, that anything of human affairs is open to some kind of doubt.

THE JUROR: That's true.

MS. FRANCESCONI-ROGERS: And that the standard of proof for the State of Ohio is proof beyond a reasonable doubt. Not beyond all doubt or foreclosing any type of doubt, but beyond a reasonable doubt.

In other words, you would have already found guilty, him guilty, if we would have moved to the penalty phase.

And then the question would be, Do the aggravating circumstances outweigh those mitigating factors beyond a reasonable doubt?

If you didn't believe him guilty beyond a reasonable doubt, we wouldn't even get to Phase 2.

THE JUROR: That's true.

MS. FRANCESCONI-ROGERS: Are you willing to hold the State to proof beyond a reasonable doubt and not any other standard?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: I pass for cause, Judge.

THE COURT: You may inquire, Mr. Whitney.

MR. ROBERT WHITNEY: Thank you, Judge. Mrs. Chronister, the words "proof beyond a reasonable doubt" and so forth, Mrs. Rogers has related to what Judge Henderson will instruct the jury, proof beyond a reasonable doubt, and I'm sure you were instructed this

way, is that type of proof that you would be willing to rely and act upon in the most important of your daily affairs, which is a fairly good standard to follow.

And it's not proof beyond all doubt or shadow of a doubt and so forth.

Assuming that we get to this penalty phase, and I know it seems strange that we're here talking right now about penalty and we haven't even decided guilt or innocence yet, but we have to do that because that's the way the state law says we have to do it. We can't stop after the innocent-guilt phase and then talk about penalty or punishment.

So we're not conceding the questions -- myself, Rolf, Max White are not conceding we could get to that penalty phase because we're sitting here talking about it. Do you understand --

THE JUROR: Right.

MR. ROBERT WHITNEY: -- we have to talk about it now. You responded one time in response to Mrs. Rogers's question if you felt he was guilty you could sign a verdict.

Now, in this particular case, there could possibly be two verdicts. If the State proved beyond a reasonable doubt Count No. 1, wherein Max is charged with aggravated murder, and they could also prove one of

the death-penalty specifications beyond a reasonable doubt and prove beyond a reasonable doubt -- or at that point we would have a verdict of guilty or innocent of aggravated murder.

If he's found guilty of aggravated murder and one of those specifications, then we go to the penalty phase.

The fact that you signed a verdict here in the guilty-innocence phase, would that automatically in your opinion make you sign a death-penalty verdict in the penalty phase, or would you be willing to listen to evidence in the penalty phase and weigh the mitigating circumstances against the aggravating circumstances?

THE JUROR: If I found him guilty, then I would have to do -- there would have to be a punishment. Now whether I'm saying it would be a death penalty at this point, I don't know.

MR. ROBERT WHITNEY: In other words -- go ahead.

THE JUROR: I guess it would apply to what he's found guilty, what charges.

MR. ROBERT WHITNEY: We only get to the penalty phase if he's found guilty of the aggravated murder.

If you find him guilty of the aggravated

murder, then we proceed to the penalty phase. And there could be three penalties. It could be a penalty of 20 years to life or 30 years to life. Or if the State proved beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating, it could be the death penalty.

My question, Are you willing to listen to all the evidence and follow the law as given to you by the Court before you make that decision as to penalty?

THE JUROR: Yes.

MR. ROBERT WHITNEY: It wouldn't just be because you signed a guilty verdict that you're going to say death penalty?

THE JUROR: No, sir.

MR. ROBERT WHITNEY: All right. Fine. Thank you, Mrs. Chronister. Pass for cause, Judge.

THE COURT: Anything further, Mrs. Rogers?

MS. FRANCESCONI-ROGERS: No, thank you.

THE COURT: All right. Mrs. Chronister, you're excused. We'd ask that you return to Courtroom No. 2 at one o'clock tomorrow. Thank you.

We're going to stand in adjournment.

(Time is 4:21 p.m.)